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To whom it may concern,

I am a senior lecturer at the Australian National University College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). I have a Bachelor of Arts (Hons) and a University Medal in literature, and a Bachelor of Laws (Hons) from the Australian National University, and a PhD in law from the University of New South Wales. I am the author of thirty-four refereed articles and a book chapter on copyright law, patent law, trademark law, and defamation law. I have also edited a special collection on patent law and biological inventions for *Law in Context*, and I am writing two monographs, *Digital Copyright and the Consumer Revolution* and *Intellectual Property and Biotechnology*. I have also been a chief investigator for an ARC Discovery project on gene patents, and an ARC Linkage project on plant breeders' rights. This submission reflects my own views on plant breeders' rights, farm-saved seed, and enforcement. The centre to which I belong to has a diverse range of opinions on such subjects, which cannot be easily encapsulated.

In my opinion, the Advisory Council on Intellectual Property should investigate whether it is feasible and viable to implement a legislative scheme for the collective administration of plant breeders' rights. A collecting society for plant breeders' rights would involve an organisation that administers the rights of individual plant breeders. It could grant permission to use propagating material and set conditions for their use. Such collective management would be a tool that rights-holders could employ when the individual exercise of the rights is impractical or inefficient.

Such a regime could address a number of concerns raised by the inquiry into plant breeders' enforcement. The exclusive role of the Plant Breeders' Rights Office is to determine the validity of applications for plant breeders' rights. It would be inappropriate for this independent arbiter to be involved in the management and enforcement of plant breeders' rights. An independent collecting society for plant breeders' rights would fulfil this separate role. The seed industry has expressed concerns that many of its members – especially individual plant breeders and small-to-medium businesses - lack the capacity or expertise to enforce plant breeders' rights. A collecting society for plant breeders' rights would be able to bring infringement actions on behalf of its members. The seed industry has also raised concerns about the ability of their members to manage and exploit plant breeders' rights. A collecting society would help facilitate transactions between the owners of plant breeders' rights, and the users of plant breeders' rights. Furthermore, there is a need to provide formal, legislative backing for the industry practice of end-point royalties. There is a need to amend the *Plant Breeders' Rights Act* 1994 (Cth) to provide for statutory licensing in respect of end-point royalties. A collecting society for plant breeders' rights would be an appropriate independent body to administer statutory licenses in respect of end-point royalties.

The Advisory Council on Intellectual Property should also take into account some of the issues and challenges, which have arisen in respect of the collective administration of intellectual property rights. The Federal Government – and the agricultural industry – would have to make a significant outlay to start-up such a collecting society. There would be a need to determine the nature of such a collective administration – in particular, whether it would be a voluntary system; a compulsory system; or a mix of the two. A collecting society in respect of plant breeders' rights would enjoy a dominant position in the marketplace. There would be a need to obtain authorisation from the Australian Competition and Consumer Commission in respect of the operation of the scheme. Furthermore, there would be a need for proper regulatory oversight of a collecting society in respect of plant breeders' rights. Voluntary codes of conduct have proven to be an ineffective means of governing collecting societies in the context of copyright law. There would need to be an administrative body empowered to establish, either mandatorily or at the request of an interested party, the

royalties to be paid for the use of plant breeders' rights, when the administration of such copyright is entrusted to a collective-administration society.

The Advisory Council on Intellectual Property should seek to preserve the special identity of the plant breeders' rights regime. It would be inappropriate to discard unique doctrinal features – such as the criteria for distinctiveness, uniformity, and stability; the cascading rights of plant breeders; the doctrine of essential derivation; and the special exceptions for farm-saved seed. The plant breeders' rights regime should be a viable alternative to the patent regime.

The Advisory Council on Intellectual Property should clarify the 'cascading rights' of plant breeders. The Cultivaust litigation illustrated that there needs to be further elucidation as to the circumstances in which plant breeders' rights cascade from propagating material to harvested material and products arising from the harvested material. In particular, it is worth defining what a reasonable opportunity to exploit propagating material involves. As a matter of clarification, the Cultivaust litigation involved questions of the exhaustion of plant breeders' rights – rather than matters of the farmers' privilege. The Full Federal Court was critical that the trial judge confused the two issues. Unfortunately, the issues paper compounds the error of the trial judge – by conflating questions of 'cascading rights' and farm saved seed (in 4.1 of the issues paper). It would be preferable if the Advisory Council on Intellectual Property decouple the issues of a reasonable opportunity to exploit propagating material from matters of farm-saved seed. One should not confuse rights with exceptions.

The integrity of the farm saved seed provisions under the *Plant Breeders' Rights Act* 1990 (Cth) should be respected and preserved. Such exceptions serve an important practical and symbolic function. The defence provides recognition of an old-tradition of saving seeds in farming. The farm-saved seed exception also provides legitimacy to the *Plant Breeders' Rights Act* 1990 (Cth), especially amongst rural and regional sectors. There would be a political outcry amongst agricultural communities if the farm-saved seed provisions were curtailed, replaced, or annulled. It is recommended that the *Plant Breeders' Rights Act* 1990 (Cth) be amended to provide that an agreement, or a provision of an agreement that excludes or modifies the farmers' privilege have no effect. It is recommended that the *Plant Breeders' Rights Act* 1990

(Cth) be amended to ban genetic restriction use technologies, which have the effect of excluding or modifying the farmers' privilege. It is recommended that a farmers' privilege should be included in the *Patents Act* 1990 (Cth). It should specify that farmers are permitted to save and sow seeds from patented plants, as long as these progeny are not sold as commercial propagating material.

The other key exceptions in the *Plant Breeders' Rights Act* 1990 (Cth) – such as the defence of experimental use, the equitable remuneration provisions, and the safeguards for reasonable access to plant varieties – should also be retained.

Furthermore, the concept of essential derivation should be preserved under the *Plant Breeders' Rights Act* 1990 (Cth), as it serves a useful function. My colleague, Jay Sanderson, has analysed the concept of 'essential derivation', which is a doctrinal feature of plant breeders' rights regimes. The concept of 'essential derivation' serves to stratify and differentiate the regimes of intellectual property. Due to the concept of essential derivation, plant breeders' rights are more attractive to traditional plant breeders; whereas patent protection is more appropriate for genetic engineers. Sanderson argues that there is a need to clarify the meaning of the doctrine of 'essential derivation'. He considers the first decision on 'essential derivation' in the Civil Court of the Hague in the Netherlands in *Astée Flowers v Danziger*, which involved a dispute in relation to the *Gypsophila* plant variety. Sanderson considers the limits of science in elucidating the meaning of essential derivation. He calls for a qualitative, fact-based assessment of the notion of 'essential derivation'. This would be a sensible course of reform.

The *Plant Breeders' Rights Act* 1990 (Cth) provides an impressive arsenal of civil and criminal remedies in respect of infringement of plant breeders' rights. There is no pressing need to add to this array of remedies. Plant breeders and the seed industry need to be better prepared and willing to use civil remedies (the addition of a collecting society may help in this course). Criminal remedies are reserved for exceptional circumstances in matters of intellectual property (which is only right and proper). It would be sensible to add alternative dispute resolution mechanisms to the *Plant Breeders' Rights Act* 1990 (Cth). It seems to me that both owners and users of plant breeders' rights are reluctant to be involved in court conflicts. Mediation would

be helpful to avoid unnecessary conflicts in the agricultural sector. The *Plant Breeders' Rights Act* 1990 (Cth) does not require exceptional remedies, like those accorded to the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission. Such measures would seem ill-suited to the litigation arising in respect of plant breeders' rights.

At present, the *Plant Breeders' Rights Act* 1990 (Cth) provides exclusive protection for 20 years for plant varieties, and 25 years for trees and vines. The Plant Breeder's Rights Advisory Committee has released an Issues Paper about extending the duration of plant breeder's rights protection.

In other intellectual property regimes, there has been much controversy about the extension of intellectual property rights, without regard to empirical economic evidence. The history of patent term extensions is instructive. In 1994, Australia extended its patent term for 16 to 20 years in compliance with the *TRIPS Agreement* 1994. The Productivity Commission suggested that such an extension provided windfall gains to existing patent holders, without any concomitant consumer benefit. In 1998, Australia passed further laws, allowing for patent term extensions for pharmaceutical drugs for up to another 5 years. Such measures were entrenched by the *Australia-United States Free Trade Agreement* 2004.

There has been much criticism that such patent term extensions have not been justified in terms of the research and development costs of pharmaceutical drug manufacturers. The copyright term extensions in the European Union, the United States, and Australia have had an adverse economic impact. Economist Phillipa Dee suggested that lengthening the duration of copyright protection in Australia would lead to significant increase in royalty payments to overseas copyright holders.

In this context, it is doubtful that lengthening the duration of plant breeder's rights would serve as much incentive for plant breeders. A lack of uniformity of duration between plant varieties could create additional uncertainty and confusion amongst farmers, growers, and researchers. It would be productive to help encourage plant breeders to develop business plans to efficiently exploit plant breeder's rights in the time available.

There remains an uneven knowledge of plant breeders' rights and related intellectual property rights in the agricultural sector. As a result, technology developers may have unrealistic expectations of what intellectual property rights can achieve. Moreover, farmers and growers may inadvertently infringe plant breeders' rights, because of a lack of awareness of their rights and responsibilities. There is a need to improve the literacy of plant breeders, technology developers, and business managers in respect of plant breeders' rights. Similarly, there is scope for further education programmes for farmers, growers, researchers, and scientists. Moreover, there is a need for a better knowledge of plant breeders' rights amongst rural advisors – including solicitors, accountants, and consultants.

I would be happy to be involved in further consultations with the Advisory Council on Intellectual Property in respect of its inquiry on plant breeders' rights enforcement.

Yours sincerely,
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